
(2002) 10 AHC CK 0034

In the Allahabad High Court

Case No : Criminal Miscellaneous Writ Petition No. 4778 of 2002

Shiv Prasad Pandey

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 10-10-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 306, 323, 498A, 511

Citation : (2003) CriLJ 1835 : (2003) 2 DMC 711 : (2003) 3 RCR(Criminal) 226

Hon'ble Judges : U.S. Tripathi, J

Bench : Single Bench

Advocate : Ram Nand Pandey and P.N. Pandey, for the Appellant; A.G.A., for the Respondent

Judgement

U.S. Tripathi, J.—This petition under Article 226 of the Constitution of India has been filed for issue of a writ, order of direction in the nature of certiorari quashing the order passed by IV Additional Civil Judge, (Junior Division), Basti dated 13-5-2002 in Criminal Case No. 160 of 2001 State v. Shiv Prasad Pandey punishable under Sections 498A, 306, 504, 323, IPC, P.S. Chhawani District Basti and the order dated 28-6-2002 passed by Sessions Judge, Basti in Criminal Revision No. 269 of 2002 and for quashing the order issuing non bailable warrant against the petitioner in Criminal Case No. 160 of 2001.

2. On 25-5-1998 at 4.30 p.m. Smt. Tara Devi opposite party No. 2- lodged a report against the petitioner and two other accused under Sections 498A, IPC and 3/4 Dowry Prohibition Act with the allegations that she was married with the petitioner according to Hindu rites and her gauna ceremony was performed 5 years ago. Her father had given Rs. 2,500/- cash, golden ring, golden chain and other things in dowry. The petitioner Shiv Prasad Pandey and his father Ram Munnar Pandey and mother Smt. Rajpati Devi started further demand of dowry and they started treating her with cruelty. Prior to three or four days of lodging of report, she was turned out of her matrimonial home by her husband.

3. On the basis of above report, a case at crime No. 89 of 1998 u/s 498A, IPC

and 3/4 Dowry Prohibition Act was registered. It further appears that after investigation, the police submitted charge sheet against the petitioner alone under Sections 498A, 323, 504 and 306, IPC.

4. On receipt of charge-sheet in the Court cognizance was taken by the Magistrate. The petitioner moved an application on 13-5-2002 before the magistrate (Additional Civil Judge (Junior Division) IV/ Magistrate) Basti for dropping the proceedings u/s 306 IPC on the ground that the complainant Smt. Tara Devi was alive and was living with him. He had also filed compromise and Section 306 IPC was wrongly shown in the charge-sheet.

5. The learned Magistrate on considering the case of the parties held that according to Sections mentioned in the charge-sheet case was exclusively triable by the Court of Sessions and therefore, he cannot drop the proceedings. With these findings he rejected the application, vide order dated 13-5-2002.

6. Aggrieved with the order, the petitioner filed Criminal Revision No. 269 of 2002 before the Session Judge, Basti. Learned Sessions Judge on hearing the learned counsel for the parties held as below :-

"The contention of the learned counsel for the accused revisionist is that undisputedly Smt. Tara Devi is alive and in the circumstances, the offence u/s 306 IPC cannot be made out. On the factual matrix the submission of the learned counsel for the accused is not disputed. It is also admitted to the learned State counsel that wife Smt. Tara Devi is alive. From the perusal of the case diary, I find statements " of other witnesses including the mother of Smt. Tara Devi to the effect that in an attempt to commit suicide from the cruel acts and behaviour of the revisionist, Smt. Tara Devi jumped into Saryu river and she was saved. In such circumstances, even if the offence u/s 306 IPC was not completed at this stage, the offence u/s 306 IPC read with Section 511 of IPC cannot be ruled out. In these circumstances, the approach of the learned Magistrate cannot be said to be illegal."

7. He further held that revision was preferred against an interlocutory order and the applicant was at liberty to raise this point before the Sessions Judge. With these findings, he dismissed the revision and the impugned order of the Magistrate was sustained to the extent that question of sustainability of the offence u/s 306 IPC read with Section 511 IPC can be seen at the time of framing of charge.

8. The above orders of the Magistrate and Revisional Court have been challenged in this writ petition.

9. The fact that the complainant Smt. Tara Devi wife of the petitioner is alive, is not disputed, therefore, issuance of notice to Smt. Tara Devi was dispensed with, as the learned counsel for the petitioner confined his contention to the maintainability of offence punishable u/s 306 IPC or 306/511 IPC only.

10. The learned A.G.A. sought and allowed two weeks" time for filing counter-

affidavit. But no counter-affidavit was filed.

11. Heard the learned counsel for the petitioner and the learned A. G. A.

12. The contention of the learned counsel for the petitioner was that Smt. Tara Devi is alive and living with him as his wife and therefore there was no question of making out any offence punishable u/s 306 IPC. That the learned Sessions Judge without submission of any charge-sheet u/s 306/511 IPC has wrongly converted the offence u/s 306 IPC to the offence u/s 306/511 IPC.

Section 306 IPC reads as under :--

"Abetment of suicide. - If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

13. As mentioned above, it is admitted case of the parties that Smt. Tara Devi had not committed any suicide and is still alive. Therefore, there is no question of making out any offence punishable u/s 306 IPC against the petitioner.

14. The fact that offence punishable u/s 306 IPC was not made out, was accepted by the learned Sessions Judge, but he went a step further and observed that it is clear from the statement of mother of Smt. Tara Devi and other witnesses during investigation that in an attempt to commit suicide from the cruel act or behaviour of the revisionist, Smt. Tara Devi jumped into Saryu river but was saved. Therefore, offence u/s 306 IPC read with 511 IPC cannot be ruled out.

15. Section 511 IPC, which deals with punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment reads as under :--

"Whoever attempts to commit an offence punishable by this Code with (imprisonment for life) or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both."

16. According to learned Sessions Judge, offence punishable u/s 306/511 IPC was made out against the petitioner, which means that the petitioner attempted to abet to commit suicide. Abetment as defined in Section 107 IPC reads as under :--

"Abetment of a thing. -- A person abets the doing of a thing, who --

First - Instigates any person to do that thing; or

Secondly - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation I - A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2.- Whoever, either prior to or at the time of commission of an act, does any thing in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

17. Section 109 IPC which deals with punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment reads as under :--

"Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence."

18. I have also perused the photo copy of case diary produced by the learned counsel for the petitioner. The father and mother of Smt. Tara Devi have no doubt disclosed in their statements u/s 161 Cr.P.C. that Smt. Tara Devi once jumped into river Saryu, but she was saved. But Smt. Tara Devi disclosed in her statement u/s 161 Cr. P. C. as below :--

(Vernacular matter omitted..... Ed.)

19. Moreover, the offence punishable u/s 109 IPC i.e. abetment is made out after the act abetted is committed in consequences of the abetment and no express provision is made by the Code (I.P.C.) for the punishment of such abetment. When the substantive offence of abetment is made out on the commission of the offence how its attempt could be made without its commission. Therefore, the offence of abetment or attempt is only made out when the offence abetted, is committed in consequence of the abetment. Therefore, in view of the facts and circumstances of the case no offence u/s 306/511 IPC could be said to have been made out. The learned Sessions Judge thus wrongly held that if the offence punishable u/s 306 IPC was not made out, the commission of the offence by the applicant punishable u/s 306/511 IPC could not be ruled out. Consequently, the offence punishable u/s 306 IPC was wrongly shown in the charge-sheet probably due to utter ignorance of the Investigating Officer.

20. The approach of the learned magistrate can also not be appreciated as he was required to commit the offence if it appears to him that offence exclusively

triable by the Court of Sessions was made out. No Offence punishable u/s 306 IPC is made out, if the victim is alive. The Magistrate is not expected to act blindly on the direction of the Investigating Officer. He had to see whether the ingredients of the offences shown in the charge-sheet are present. It is true that the jurisdiction of the magistrate u/s 209 Cr. P. C. is not to scrutinise and assess the evidence collected during investigation. But he must satisfy that "it appears to him that the offence is triable exclusively by the Court of Sessions." He should not be misguided by mentioning the wrong Section by the I.O.

21. In view of above discussions and observations I find that charge-sheet relating to offence punishable u/s 306 IPC only is liable to be quashed.

22. The writ petition is, accordingly, allowed in part.

23. The offence shown in the charge-sheet against the petitioner u/s 306 IPC is quashed and the magistrate is directed to proceed with the case u/s 498A. 323 and 504 IPC in case crime No. 89 of 1998. Consequently, the impugned orders dated 13-5-2002 and 28-6-2002 are quashed.

24. It is also made clear that non bailable warrant issued against the applicant shall remain in abeyance for a period of three weeks, provided the petitioner appears before the Court concerned on or before 1-11-2002. In case, he fails to appear on or before 1-11-2002 before the Court concerned, non bailable warrant issued against him shall become executable thereafter.